78-633

IN THE

Supreme Court of the United States

October Term, 1978

LOCAL 102 INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Local 102 International Ladies' Garment Workers' Union, by its counsel, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered in the above case on August 16, 1978, and from which rehearing was denied on August 29, 1978.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York and the opinion of the United States Court of Appeals for the Second Circuit, affirming the decision of the District Court have not yet been reported, but are attached hereto as Appendices 1 and 2, respectively.

Jurisdiction

The Order of the United States Court of Appeals for the Second Circuit was entered on August 16, 1978. Petitioner timely filed a petition for rehearing and rehearing in banc. On August 29, 1978, the Second Circuit denied the petition for rehearing, and granted the Respondent's application for the immediate issuance of the mandate. The Second Circuit denied the Petitioner's petition for rehearing in banc on September 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Is *abuse* of the attorney-client privilege by the client, in communicating with its attorneys for the *purpose* of committing or furthering a crime, required to be shown, before an attorney will be compelled to testify concerning privileged confidential communications had with his client, or is it sufficient to destroy the privilege merely to show that third parties are engaging in ongoing criminal activity of which neither the attorney nor the client have knowledge or are participants?

Statement of Facts

Petitioner ("the client") is a labor union within the meaning of the National Labor Relations Act. The client had a yearly retainer agreement at all relevant times and for many years prior thereto with the law firm of Jaffe Cohen Crystal & Mintz, presently Marchi Jaffe Cohen Crystal & Mintz (hereinafter "the law firm"), and that firm represented the client in connection with a National Labor Relations Board ("NLRB") proceeding, where another union was seeking to be certified as collective bargaining representative for employees of an employer who was

already subject to a collective bargaining agreement with the client. The representation petition was scheduled for a hearing on the merits before the NLRB on May 2, 1978. On May 1, 1978 the client, by its manager, had two confidential conversations with an attorney in the law firm, and that attorney had one conversation with one of his partners concerning one of the conversations had with the client, all in connection with the matter scheduled for adversary hearing the following day. The respondent sought to compel the attorneys to disclose the substance of these privileged, confidential communications, claiming that the attorney-client privilege was inapplicable because the conversations allegedly related to on-going criminal activity of third parties. Both Courts below found, and the government concedes that neither of the attorneys had any knowledge nor any part of the alleged corrupt scheme, and, *a fortiori*, the communications must have been innocent on their face and could not have contained anything improper, or the attorneys would have been knowledgeable.

The sole basis upon which respondent sought to deprive the client of its attorney-client privilege was the fact that third parties (including the employer), with whom the client was required by law to deal, had sought to have the NLRB petition withdrawn by unlawful means, including bribery of officials of the petitioning union. However, the client, who was obligated to seek dismissal of the clearly invalid petition on behalf of its members, had not engaged in anything but lawful means in attempting to secure the dismissal of the petition. The Second Circuit in essence held that the client's attorney-client privilege would be forfeited, despite the fact that the client had not *abused* its attorney-client privilege by engaging in confidential communications with its attorneys for the purpose of committing or furthering a crime, and despite the fact that the client had no knowledge of and was not a participant in the alleged crime.

The Second Circuit set forth "so far as pertinent, the facts submitted by the government in support of its claim to examine . . .", and none of those facts are disputed. Thus, the only fact conceivably relating to the client which the Court deemed significant was that "It appears that the attorneys had been notified that the petition of Local 20408 was to be withdrawn, . . .".

However, it would have been totally expected and anticipated that the petition would be withdrawn once the true facts and circumstances were known to the union which had brought the invalid petition. It was shown in the Courts below, and was undisputed, that over 21% of all certification of representative petitions filed with the NLRB, according to the NLRB's own published statistics, are withdrawn prior to the termination of the hearings, many of them for precisely the same reason that this petition should have been withdrawn, to wit: The existence of a collective agreement with another union and the selection of an inappropriate unit. Moreover, it was further established in the Courts below and again undisputed, that it was the inherent duty of the client to seek dismissal or withdrawal of such invalid petition filed by another union seeking to represent workers employed by an employer in a bargaining unit already covered by collective agreements with the client. Thus, if "the attorneys had been notified that the petition of Local 20408 was to be withdrawn," that fact would be of no significance whatsoever and surely could not constitute *prima facie* evidence of illegality.

Despite the undisputed fact that the client had not *abused* its attorney-client privilege by engaging in confidential communications with its attorneys for the *purpose* of committing or furthering a crime, and despite the undisputed fact that the client had no knowledge of and was not a participant in the alleged crime, the District Court ordered that the attorneys testify as to the substance of the privileged communications, and on August 16, 1978, the Second Circuit affirmed. Petitioner timely moved for a rehearing, and on August 29, 1978 the Second Circuit denied Petitioner's petition for rehearing, ordered that the mandate of the Court issue forthwith, and denied Petitioner's motion for a further stay. On September 1, 1978, the Honorable Louis F. Powell, Jr. and the Honorable William J. Brennan, Jr. denied Petitioner's motion for a further stay pending application for a Writ of Certiorari. On September 21, 1978, the Second Circuit denied Petitioner's petition for rehearing in banc.

Reasons for Granting the Writ

This case raises fundamental issues of exceptional importance concerning the scope of the attorney-client privilege and the administration of justice, and if the decision of the United States Court of Appeals for the Second Circuit is permitted to stand, extremely adverse consequences could result which would radically alter the present relationship between clients and their attorneys. The decision below is in conflict with the decision of this Court in *Clark* v. *United States,* 289 U.S. 1 (1932), and is in conflict with the entire body of decisional law and treatises in this country, and constitutes a radical departure from all prior precedent.

As stated above, the respondent sought to compel the testimony of the attorneys as to privileged, confidential communications had with their client, on the ground that third parties (including the employer), with whom the client was required by law to deal, had sought to have the NLRB petition withdrawn by unlawful means, although the client had not sought to have the NLRB petition withdrawn by anything other than lawful means, and

although the client had no knowledge of and was not a participant in the alleged crime.

The holding of the Second Circuit is essentially as follows:

> (i) *Abuse* of the attorney-client privilege by the client, in seeking to communicate with its attorneys for the *purpose* of committing or furthering a crime, is not required to be shown before the attorney will be compelled to testify concerning privileged confidential communications had with the client; and
>
> (ii) The attorney-client privilege dissipates as to communications innocent on their face if third parties are engaging in ongoing criminal activity of which neither the attorney nor the client have been shown to have knowledge or be participants, but where the communications merely *relate* to the same general subject matter as the alleged crime.

In *Clark* v. *United States*, *supra*, at pp. 15-16, this Court held that before an attorney could be compelled to testify in derogation of the attorney-client privilege, the opponent of the privilege was required to establish a *prima facie* case that the client had *abused* the privilege by engaging in confidential communications with its attorneys *for the purposes of* committing or furthering a crime. Thus, the key element considered is whether the client has *abused* the attorney-client privilege by utilizing the attorney-client relationship for an *improper purpose*. This longstanding principle stems from the common law (See *O'Rourke* v. *Darbishire*, [1920] A.C. 581, cited with approval in *Clark*, *supra*), and has been given more recent approval in law treatises, such as *McCormick on Evidence*, 2d Ed. 1972.

> "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme . . . Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud." *McCormick on Evidence*, *supra*, at p. 199.

The Second Circuit, however, has failed to require *any* showing that the client *abused* the privilege or utilized the attorney-client relationship for an *improper purpose*. The Second Circuit appeared to hold simply that illegality on the part of third parties would be sufficient to destroy the privilege of a client who had no knowledge of, and was not a participant in, any criminal activity, but whose only "crime" was that his conversation with his attorneys generally encompassed a similar subject matter as the alleged crime. Never before has a court gone so far toward destroying the attorney-client privilege, and never before has it even been held that *abuse* of the privilege by the client or an *improper purpose* on the part of the client are not required to be shown. The significance of the decision is monumental in its impact upon the efficient administration of our adversary system of justice in that it may have a chilling effect upon the confidence and candor which clients will invest in their attorneys. The decision constitutes a radical departure from all prior precedent, including cases before this Court, and if it is permitted to stand, it will severely restrict the force and applicability of the attorney-client privilege in situations where neither the law nor the great historic purposes behind the privilege call for restriction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix 1

(Opinion of the United States District Court for the Eastern District of New York, Dated July 27, 1978, Bramwell, *J.*)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 78C1659

In the Matter of Local 102

I. L. G. W. U. etc.

United States Courthouse
Brooklyn, New York

July 27, 1978
11:30 o'clock A.M.

Before:

HONORABLE HENRY BRAMWELL,
U.S.D.J.

* * * * *

The Court: What I am going to do is I am going to make a statement from notes on the Court's decision. For the record, the background of the instant matter will be briefly discussed.

The Organized Crime Strike Force of the United States Attorney's Office for the Eastern District of New York moves this Court for an order compelling Allen Breslow and David Crystal, attorneys for the law firm representing Local #102 of the International Ladies Garment Workers

Appendix 1

Union in the matter before the Grand Jury, to render full disclosure of certain conversations which transpired on May 1, 1978.

Attorneys Breslow and Crystal, whose law firm has a yearly retainer agreement with Local 102 respectfully decline to testify concerning two telephone conversations between Attorney Crystal and Sidney Gerstein, manager of Local 102 [and a] "thirty second" discussion between the two attorneys, all of which took place on May 1, 1978. Their refusal is based on the ground that all three conversations are protected by the attorney-client privilege.

Furthermore, the attorneys assert the well settled principle which holds that where a labor organization is a client, the members of its control group such as Mr. Gerstein are protected by the attorney-client privilege.

I must, therefore, decide whether the privilege asserted by Attorneys Breslow and Crystal should be applied in this instance.

It has long been settled that confidential communications which take place between an attorney and his client are considered privileged and, therefore, not normally subject to disclosure unless the privilege is waived by the client. The policy underpinning this privilege, which finds its roots in 18th century England, is that promotion of honest and uninhibited dialogue between those seeking legal advice and those dispensing it.

However, despite its established nature, judicial decision-makers have not hesitated to deny its application where justice demands that full disclosure be made.

The Government beseeches this Court to make such a denial in this case by asserting that the Crystal-Gerstein telephone conversations were utilized by Gerstein to further an ongoing criminal conspiracy.

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In United States v. Bob, the Second Circuit addressed itself to such a claim. Quite pointedly, the court stated, and I quote:

"It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged."

This doctrine, which is applicable to present, continuing illegality as well as intended crimes does not hinge upon the attorney's state of awareness.

In a recent decision, the Second Circuit articulated an explicit standard to be followed in a case such as this. In the Matter of Doe the court stated, and I quote:

"It is enough to defeat the claim of privilege that the contemplated crime would or might inure to the client's benefit and that he might be a participant."

This Court is in complete accord with the strict approach adopted by the Second Circuit for it would be nothing less than a perversion to present the cloak of privilege to one possibly engaged in plotting or pursuing illegal or fraudulent acts. Indeed, it is the vitality of the judicial system and not the sanctity of the privilege which must gain priority where the two are at loggerheads.

However, before this privilege can be denied and I again quote the Bob court:

"There must, of course, be first established a prima facie case; the mere assertion of an intended crime is not enough."

In the instant matter, the initial burden falls upon the attorneys seeking the application of the privilege. The Government urges this Court to find that the Crystal-Gerstein conversations did not involve the invocation or acquisition of legal advice or services and, as such, argues that its absence is fatal to the attorneys' claim of priv-

ilege. This Court, however, finds it unnecessary to conduct an exploration into the thorny edges of the Government's argument.

Rather, assuming arguendo that the attorneys at issue herein have met the criteria vital for them to overcome their initial hurdle, therefore shifting the burden to the Government to make a prima facie showing that there was a contemplated crime, that its successful completion had the potential of benefiting Gerstein and that Gerstein could have been a participant, I nonetheless, find that the disputed conversations must be disclosed.

Attorneys Breslow and Crystal assert in their memorandum of law that "substantiated allegations, by affidavit or otherwise" are required in order for the prima facie test to be made.

As support for their assertion, the landmark Supreme Court opinion in Clark v. United States is cited. However, I am of the opinion that a more accurate reading of Clark and its progeny is set forth by Professor McCormick in his treatise on evidence when he states that they require, and I quote:

"Only that the one who seeks to avoid the privilege bring forth evidence from which the existence of an unlawful purpose could reasonably be found."

It is, then, a reasonableness standard which is to be employed in determining whether the Government has met its burden.

The thrust of the Government's claim is that Sidney Gerstein, among others was involved in a criminal conspiracy to corruptly obstruct the proper administration of the National Labor Relations Board in violation of 18 U.S.C. 1505.

In particular the Government asserts that several persons linked or associated with Local 102, including Mr.

Gerstein, sought to secure the withdrawal of an organizing petition brought by Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees Union through bribery of cash payments and the admission of eleven men into the membership of Local 102. The affidavit of Mr. Harmon, Assistant Attorney-in-Charge of the Strike Force, establishes a sequence of events which a reasonable man would conclude supports the allegations of criminal activity which have been made. Without delving into each link in the chain, I find that the Government has reasonably demonstrated that the alleged criminal activity transpired.

Furthermore, the facts indicate that Mr. Gerstein was in the position of a man who could quite possibly have participated in the alleged conspiracy. It was Mr. Gerstein who performed the otherwise legal act of directing and supervising the admission of eleven men into Local 102, men whose admission is alleged to be in payment for the withdrawal of the organizing petition.

It was Mr. Gerstein who as manager and controlling officer of Local 102, stood in the passageway of any conspiratorial acts involving his union. Even the fact that it was Mr. Gerstein who made daily contact with Local 102's law firm, supports the Government's argument that he exercised a considerable degree of effective control over the union.

Therefore, I find it reasonable to conclude from the evidence presented to me that Mr. Gerstein might well have been a participant in the alleged conspiracy. Additionally, a close examination of such evidence reasonably indicates that Mr. Gerstein stood to possibly gain from the commission of the alleged crime since the withdrawal of Local 20408's organizing petition would have, in the least, stabilized Local 102's position, and, consequentially, enhance the posture of the man who exercised a considerable degree of effective control over 102.

With the foregoing in mind, I find that the Government has met its burden by establishing, prima facie, that the Crystal-Gerstein conversations may have been used by Gerstein as a means of furthering an ongoing conspiracy to violate federal law.

Therefore, this Court must deny to Attorney Crystal the protection of the attorney-client privilege in giving testimony to the Grand Jury, concerning these conversations.

Turning next to the Crystal-Breslow conversation, it is averred that the attorney work product rule acts as a barrier to the disclosure since said conversation was conducted, and I quote the attorneys' memorandum of law:

"In anticipation of or in connection with the pending civil proceeding before the NLRB."

This Court is slightly bemused by the invocation of the work-product rule given the direct relationship between the Gerstein conversations, and this one, a relationship which was acknowledged by Attorney Crystal in his testimony before the Grand Jury on June 12, 1978.

Furthermore, counsel has failed to cite a single authority which supports the application of the work-product rule in this context. While recognizing the tenor of counsel's argument, this Court is not prepared to shelter a discussion between lawyers which is admittedly interwined with the May 1, converations with Mr. Gerstein. Rather, this Court finds that the denial of privilege to the Crystal-Gerstein conversations is necessarily fatal to the claim of privilege concerning the Crystal-Breslow communication.

In making these findings I recognize the sensitivity which still surrounds the entire question of when the attorney-client privilege should be applied. I also take cognizance

of the resourceful arguments strongly asserted by counsel for Mr. Breslow and Mr. Crystal in seeking to protect the interests of their client.

In the final analysis, however, the force of the arguments in favor of the privilege's application are far outweighed by the demands of justice which demands its denial in this case.

Therefore, it is hereby ordered that Allen Breslow and David Crystal render full disclosure before the Grand Jury empaneled for the matter of Local 102 of the two telephone conversations of May 1, 1973 between Mr. Crystal and Sidney Gerstein and the conversation of May 1, 1978 between Mr. Crystal and Mr. Breslow.

The record of my opinion on this matter is to be sealed until further order of the Court. The parties are to settle an order on notice in conformity with the decision I have just rendered, and said order, upon signature of the Court, is also to be sealed. The parties herein are further ordered not to disclose the contents, substance or decision of the proceedings held today.

And I might say that I have read from notes due to the need for secrecy herein, and considering this no written opinion will follow.

Yes?

* * * * *

Mr. Jaffe: Your Honor, there are two things that I would request from your Honor. One is that in your opinion you put in a statement that Mr. Harmon acknowledged as late as yesterday that neither Mr. Crystal nor Mr. Breslow had any knowledge or any part of the corrupt scheme just in case their opinion ever gets published in a future date. This file will eventually be opened. My understand-

Appendix 1

ing, according to your order after the indictments come down.

The Court: If that is what he said I don't know what he is going to say—

Mr. Harmon: I still stand by the earlier statement as far as that is concerned. I have no objection to their being put.

The Court: To that extent the opinion is correct, and now so noted.

Mr. Jaffe: Thank you, your Honor.

* * * * *

Appendix 2

(Order of the United States Court of Appeals for the Second Circuit, Dated and Entered August 16, 1978)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78-6125

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15 day of August, one thousand nine hundred and seventy-eight.

Present:

Hon. Ellsworth A. Van Graafeiland, Circuit Judge
Hon. Howard T. Markey, Chief Judge, U. S. Court of Customs and Patent Appeals
Hon. John F. Dooling, District Judge.

In the Matter of LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, DAVID CRYSTAL, ALLEN BRESLOW,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER

Local 102 and two of its attorneys have appealed from an order directing the attorneys to testify before a grand jury concerning conversations had with their client.

So far as pertinent, the facts submitted by the Government in support of its claim to examine are as follows.

Appendix 2

On April 5, 1978, Local 20408, United Warehouse Industrial and Affiliate Trades Employees Union filed a petition with the NLRB seeking recognition as the collective bargaining agent for certain employees of Interstate Dress Carriers, Inc. Interstate Dress Carriers was operating under a collective bargaining agreement with Local 102, Cloak and Dress Drivers and Helpers Union, International Ladies' Garment Workers' Union. The Government has secured evidence that an Interstate officer and several Teamsters Union officials participated in a bribe offer to the president of Local 20408 to induce him to withdraw his Union's petition for recognition. These officials have now been arrested and charged with violation of 18 U.S.C. § 1505.

On May 8, 1978, a special grand jury was impaneled to investigate this incident. The jury seeks, among other things, to determine whether officials of Local 102 were also involved. Towards this end, the grand jury seeks to examine two attorneys representing Local 102 concerning telephone conversations had with their client. It appears that the attorneys had been notified that the petition of Local 20408 was to be withdrawn, and this appears to be the subject matter of the conversation into which the grand jury wishes to inquire.

At the outset, we are met with the question of whether this is an appealable order. There is authority for the proposition that it is not. *See Duffy* v. *Dier,* 465 F.2d 416 (8th Cir. 1972); *In re Buckey,* 395 F.2d 385 (6th Cir. 1968); *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.,* 380 F.2d 277, 281 n. 9 (2d Cir. 1967). However, there is also authority to the effect that an intervenor may appeal where the testimony is that of a third party. *See In re Grand Jury Proceedings,* 563 F.2d 577 (3d Cir. 1977). We accept review of this case on behalf of Local 102 and dismiss as to the individual appellants.

Appendix 2

The attorney-client privilege does not extend to communications made in furtherance of ongoing criminal activity. As this Court stated in *In Re Doe,* 551 F.2d 899, 902 (2d Cir. 1977), "The attorney-client privilege has no relation to the disclosure of on-going criminal activity or information relating to it." The Government need not establish the requisites for disclosure beyond a reasonable doubt; it need only make a prima facie case. *See United States* v. *Bob,* 106 F.2d 37 (2d Cir.), *cert. denied,* 308 U.S. 589 (1939); *United States* v. *Hodge and Zweig,* 548 F.2d 1347 (9th Cir. 1977). Although the Government makes no contention of wrongdoing on the part of the attorneys, the information that it has presented is sufficient insofar as the client is concerned to require that testimony be given.

The order appealed from is affirmed.

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. HOWARD T. MARKEY

HON. JOHN F. DOOLING

August 16, 1978.